SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 232

J. M. SARTOR, ET AL.,
Petitioners,

vs.

ARKANSAS NATURAL GAS CORPORATION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF.

G. P. Bullis,
Counsel for Petitioners.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

To the Honorable, The Supreme Court of the United States:

Petitioners, James M. Sartor, Daniel R. Sartor and Mrs. Earline Sartor, individually and as executrix (plaintiffs in the lower Court), pray that writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Fifth Circuit, in the above entitled suit.

Jurisdiction.

Review is sought under United States Code, Title 28, Section 347 (Judicial Code, Sec. 240). The Judgment of the Court of Appeals was rendered March 29, 1943; rehear-

ing was applied for on April 16, 1943; and rehearing was denied without opinion on May 11, 1943. The opinion of the Court of Appeals is reported in 134 Fed. (2) 483.

Questions Presented.

Question No. 1. The use or mis-use of Summary Judgment, as permitted by Rule 56 of the Rules of Civil Procedure for the District Court of the United States, adopted by this Court on Dec. 20, 1937, said Rule 56 reading in its pertinent part:

> "(b) A party against whom a claim, counter claim, or cross-claim is asserted, or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
>
> (c) * * * The judgment sought shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.
>
> (e) Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissable in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

(1-a). May a District Court deprive a litigant of trial by jury, by granting summary judgment, when the evidence is conflicting, and summary judgment requires the determination of controverted facts and the weight, sufficiency and effect of evidence?

(1-b). May the *opinions* of witnesses testifying by affidavit be used as a basis for summary judgment, or must the testimony be on facts only?

(1-c). Is a litigant deprived of due process of law, when hostile witnesses testify to their opinions by affidavit, and the litigant is deprived by the practice in summary judgment, of the right to cross-examine these hostile witnesses as to their qualifications as experts, and the basis of their opinions.

(1-d). When two juries have decided all the facts in a case in favor of plaintiff, in previous trials, may summary judgment be rendered in favor of defendant on the same facts?

(1-e). The rule states that "pleadings, depositions and admissions on file" shall be used on trial for summary judgment. Does this include documents filed in a previous trial of the same case?

(1-f). May the affidavits of witnesses state the contents of written documents not in evidence?

Question No. 2. Did the Court of Appeal decide an important question of local law in a way in conflict with applicable local decisions, in deciding that land-owners holding leases entitling them to a royalty of one-eighth of the market price of the gas produced, are entitled to the market price at the well, to be determined by opinions of experts, when the Supreme Court of Louisiana has decided they are entitled to the market price in the field where the gas is produced, to be determined by sales in the field?

Statement of the Matter Involved.

Petitioners, who are farmers, ignorant of the gas business, own a farm situated in the Richland gas field, in Louisiana. This gas field is a small area, about eight miles square, from which large quantities of natural gas have been produced.

Petitioners leased their land to respondent, Arkansas Natural Gas Corporation, by a customary and widely used

form of lease, stipulating that respondent, as lessee, should bear all of the expense of producing and marketing natural gas from the land, and pay to petitioners, one-eighth of the MARKET PRICE of all gas produced (R. 5, 7). Under this lease, respondent produced much natural gas.

Petitioners filed this suit on March 20, 1933, asking the Court to determine the market price of gas, to which they were entitled under their lease, for the years 1927 to 1932 inclusive.

This issue was tried by jury in 1934. On this trial, a statement of facts, agreed to by both parties, was filed in evidence, showing that all of the sales of gas in the Richland gas field during those years were made by nineteen written contracts of sale. All sales, except one trivial sale of drilling gas, are sales to pipe lines which were built into the field to take the gas to distant points of consumption. This is the only way in which natural gas can be marketed, and the sales are for delivery over a period of several years. Most of these sales were made in 1928 and 1929. The prices in these sales, at the receiving points in the Richland field were 2½¢ to 7.6¢ per thousand cubic feet (R. 44, 69). The agreed statement of facts stipulated that the cost of transporting gas from the wells to the delivery point to these pipe lines in the gas field was 3/10 of 1¢ (.3¢) per thousand cubic feet (R. 77). No gas was sold at the wells involved in this suit.

On this evidence, the jury brought in a verdict reading as follows (R. 17):

> "We, the jury, find for the plaintiff, fixing the market price of gas at 4½¢ from 1927 to 1932 inclusive. Said price to be paid at the point of delivery."

On appeal, the Court of Appeals for the 5th Circuit reversed and remanded for new trial, holding that the District Court erred in admitting in evidence the written con-

tracts of sale, because they guaranteed delivery of large quantities of gas. *Arkansas Natural Gas Co.* v. *Sartor*, 78 Fed. (2) 924. How market price can be proved without proving the sales, or why large sales do not prove market price, the Court did not explain.

On second trial in 1937, this ruling of the Court of Appeals was disregarded; and the same contracts of sale were introduced in evidence as on the first trial. This was necessary because there were no other sales, and the parties and trial court knew no other way to prove market price. However the District Court ruled that petitioners' claims for gas produced prior to March 20, 1930 were barred by statute of limitations (called "prescription" in Louisiana). Under this ruling, the jury in this second trial brought in the following verdict (R. 21):

> "We, the jury, find for plaintiffs, that the average price of gas at the well in Richland Parish, Louisiana field during the period beginning March 20, 1930 and ending March 20, 1933 to be .0445 per 1000 cu. ft. at 8 oz. pressure."

This jury, when polled, explained that this price of .0445 (4.45¢) was reached by fixing the market price in the field at 4.75¢, and deducting .30¢ for agreed cost of delivery from the wells to the pipe line receiving stations, leaving the market price of 4.45¢ at the well.

A second time this case was carried to the Court of Appeals for the 5th Circuit. This time, that Court affirmed the above jury verdict. *Sartor* v. *Arkansas Natural Gas Co.* 98 Fed. (2) 527.

However, the Court of Appeals reversed the ruling of the District Judge that petitioners' claims prior to March 20, 1930 were barred by statute of limitations, and remanded the case for award to petitioners of the market price for gas produced prior to March 20, 1930, the Court indicating that this might be done without new trial, evidently mean-

ing that the market price prior to March 20, 1930 was the same as fixed by this jury after that date.

The District Judge ordered a third trial of the case, to determine the market price from 1927 to March 20, 1930, and it is this matter which is now at bar; it being now res adjudicata that the price at well was 4.45¢ on March 20, 1930 and thereafter.

Despite the fact that all possible evidence had been introduced on the two previous trials, and had resulted in two heavy verdicts in favor of petitioners; and despite the fact that it was now res adjudicata that the market price on March 20, 1930 was 4.45¢ and the sales were substantially the same before as after that date; respondent had the audacity to file a motion for summary judgment under Rule 56, as above stated.

On the trial of this motion for summary judgment, substantially the same evidence as in the two previous trials was introduced, in the form of affidavits and contracts of sale. Detailed statement of the evidence will be shown in supplementary brief. The record differed from the two jury trials in two details, as follows:

1st. The District Judge ruled that two of the nineteen contracts of sale were not in the record for summary judgment, because they were not included in specific offerings at the trial of the motion for summary judgment. Petitioners took the view that all admissions in the record from previous trials of this case were before the Court on motion for summary judgment under the express terms of Rule 56, and petitioners brought up the two contracts on bill of exceptions (R. 95). This is not of great importance under the view taken by the Court of Appeals; especially as there are many other similar contracts of sale in the record.

2nd. The vitally important difference between the record on this motion for summary judgment, and the record on

previous jury trials is, that under summary judgment practice, petitioners were not able to cross-examine respondent's witnesses.

On the two previous jury trials, respondent was confronted with the fact that all of the sales of gas showed a market price far in excess of 3¢. Respondent attempted to overcome this by having its Vice President, and the officials of other gas companies testify that in their opinion the market price did not exceed 3¢. Petitioners unsuccessfully objected to this form of evidence, but by cross-examination in open court, showed that these witnesses were unfair, interested in the outcome of this suit, and prejudiced; and that the facts on which they based their so-called opinions were largely false and untrue; thereby discrediting this testimony so clearly that each of the juries refused to give these opinions any credence whatsoever; and decisively rejected it in their verdicts.

On the trial of this motion for summary judgment, petitioners were denied the privilege of cross-examination. Hence these opinions, with all of their false statements of fact, prejudice, detailed and untrue statements of the contents of written documents not in evidence, etc., stands uncontradicted in the record. Petitioners, being farmers, were unable to obtain any gas experts to testify to expert opinions, but relied upon the facts shown in the record.

The District Court and the Court of Appeals granted summary judgment in favor of respondents, on the basis of these opinions of respondent's officials and associates.

The Court of Appeal reaffirms its ruling on the first jury trial above stated, that the contracts of sale to pipe lines are not admissible in evidence, treating this as stare decisis, and overlooking the squarely contrary jurisprudence established by the affirmance of the jury verdict on the second trial of this case, based on these contracts. *Sartor v. Arkansas Natural Gas Corporation*, 134 Fed. (2) 433, 435. All

of the nineteen contracts of sale of gas in the Richland gas field during the period here involved were pipe line sales, excepting a trivial sale of drilling gas in 1927, hence this ruling of the Court of Appeals completely eliminates all sales of gas to prove market price, leaving only the opinions of the gas company officials. On this evidence, the Court of Appeals decided as follows, (p. 436):

> "It will serve no useful purpose to enter into an analysis of the supporting proofs offered by movant. It is sufficient to say that they establish without contradiction or question of any kind that in the early years of the field involved in this suit, there was a market price for the gas at the well, and that that market price was never at any time during any of the years in question in excess of the 3¢ which defendant consistently paid."

The Court of Appeals could arrive at this holding that there is no "contradiction or question of any kind", only by eliminating from consideration, not only all the sales of gas, but also the two affidavits filed in evidence by petitioners (R. 33, 42). These two affidavits, while not pretending to be made by gas experts qualified to give opinions, did swear to facts contradicting every fact offered by respondent, and showing that respondent's witnesses were prejudiced and interested in the outcome of this suit; that many of the facts testified by them were untrue and only one of them was qualified as an expert to give opinions; and that their testimony largely pertained to the contents of written documents not in the record. Petitioners had unsuccessfully objected during the trial to the opinion affidavits of respondent on these grounds (R. 51, 52, 57, 59, 61, 62);

Since these affidavits of petitioners are unquestionably in the record, the Court of Appeals could have arrived at its verdict only by weighing these affidavits, and those offered by respondent, and deciding as between the conflicting af-

fidavits which should be accepted. This is clearly a Jury function.

Neither the District Court nor the Court of Appeals mentioned the fact that two juries, on substantially the same evidence, (except cross-examination of respondent's witnesses), had given heavy verdict for petitioners; nor the situation that it is now res adjudicata, on the verdict of the second jury, upheld by the trial judge and the Court of Appeal, that the market price is 4.45¢ on March 20, 1930, whereas the summary judgment adjudges that there is no contradiction or question, that it was less than 3¢ on the day before March 20, 1930.

Reasons for Allowance of Writ.

This Court has never in any reported case, considered the use or abuse of summary judgment, or adjudicated the practice under Rule 56, since it was adopted in 1937.

Summary judgment is a new and drastic remedy. It permits a judge to deny to any litigant, trial by jury. It bars a litigant from cross-examining hostile witnesses, and the examination of his adversary under oath, permitted by Rule 43. It permits a party to have his witnesses testify in privacy, and to put the testimony of his witnesses in perfect form, without having the witness disturbed by sitting on a witness stand before a jury and adverse attorney.

Such tremendous power is easily abused. Summary judgment will, of course, be sought by every litigant desiring to avoid trial by jury as in the case at bar. Trial by jury is the protection of the little man. Unless closely supervised and safe-guarded, summary judgment will be used in many cases all over the country to break down this protection. Summary judgment lends itself well to those who seek to "make the worse appear the better cause", especially to powerful litigants enjoying highly skilled attorneys and experts, who can prepare a trial in their offices,

without danger that a witness may say too much, or be unmasked upon cross-examination.

The case at bar seems to petitioners a clear example of mis-use of summary judgment: prejudiced witnesses testifying to opinions, with petitioners barred from cross-examination; petitioners' documentary evidence barred on technical grounds; a patent attempt by respondent to avoid jury trial; conflicting evidence and credibility of witnesses decided by the judge.

Summary judgment is a very popular and widely used practice. We respectfully submit that it would be timely, and extremely helpful to justice if writ were granted in this case, and the court draw clearly the line between use and abuse of summary judgment. Clear jurisprudence and definite interpretation of rule 56 seems now lacking.

Petitioners respectfully suggest that to avoid injustice and denial of the constitutional right of jury trial in many cases where a weak litigant is pitted against a powerful opponent, that the jurisprudence should be made clear, that summary judgment cannot be granted where there is any controverted fact; that the procedure is stricti juris; that every presumption is in favor of a jury trial; that opinion-evidence should not be permitted, but only evidence of facts; that the facts must be clear and unquestionable; that all of the documents in the record from previous trials or otherwise, are before the Court on trial of the motion without special offering; and in general, that summary judgment cannot be used as a device to trap an unwary litigant, or evade jury trial.

Second Question.

Petitioners rely, for allowance of writ, also on the second question propounded, namely, that the Court of Appeal failed to follow local law.

This is a suit on a Louisiana contract, executed in the State of Louisiana. The Supreme Court of Louisiana, in the case of *Wall* v. *United Gas Public Service Company*, 178 La. 908, 152 So. 561, had before it a lease contract having verbatim the same royalty clause as in the case at bar (this being a commonly used printed form), and in that case expressly and strongly held that the "market price" stipulated in the lease, means the market price in the gas field where the gas is produced, to be determined by the sales in the field. Petitioners' brief supplementing this petition gives full details of this Louisiana jurisprudence.

The Court of Appeals holds that "market price" in the lease means the market price at the well, and since there were no sales at the well, this market price is to be determined by the opinions of gas experts.

The decision of the Court of Appeals seems contrary to the jurisprudence established by this Court in the case of *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, holding that Federal Courts must follow local law in local cases.

The decision of the Court of Appeals, making the market price of gas dependent upon the opinions of expert witnesses instead of on actual sales, put land-owners at the mercy of the expert gas companies, because land-owners cannot command the services of gas experts.

Natural gas is one of the prime assets and major products of the United States. It is produced (in the Southern states at least) mostly under leases similar to the one here at bar, providing that the land-owner shall receive one-eighth of the market price or value of the gas produced from his land. The jurisprudence, and the method by which proof is to be made of what is this market price, is therefore of the greatest importance to thousands of big and little land-owners, at least in Louisiana and Texas.

The jurisprudence of the Supreme Court of Louisiana requires that the sales of gas be put in evidence, and from them the jury determines the market price. This is a simple, clear precedure, which would avoid all the conflicts of evidence in the case at bar. Land-owners can easily prove the sales, so this jurisprudence puts the land-owners on terms of equality with the gas companies, in the production of evidence.

Prayer.

WHEREFORE, petitioners respectfully pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit, to certify and send to this Court a full transcript of the record and all proceedings in the case entitled J. M. Sarter, et al. *v.* Arkansas Natural Gas Corporation, No. 10,517 on the docket of said Court of Appeals, and after due hearing and consideration by this Court, that the judgment of said Court of Appeals be reversed and remanded to the United States District Court for the Western District of Louisiana for trial by jury; and for such other relief as to this Court may seem proper.

G. P. BULLIS,
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BRIEF SUPPORTING PETITION.

Petitioners show additional details of the two questions submitted in petition.

1. Summary Judgment.

To show how the Court of Appeals mis-applied the beneficient remedy of summary judgment, a more detailed statement of the record in the trial of the motion for summary judgment is here submitted.

Respondent or Movant's Evidence.

To support its motion for summary judgment, respondent, Arkansas Natural Gas Corporation, relied almost entirely on six affidavits of gas officials, swearing that, in their opinion, the market price of natural gas in the Richland

gas field never exceeded 3¢ per thousand cubic feet. These affidavits are:

D. W. Harris, Vice-President of respondent (R. 49);
S. D. Hunter, President of Ouachita Natural Gas Co. (R. 51);
R. H. Hargrove, Vice-President of United Gas Pipe Line Co. etc. (R. 52, 59);
E. N. Florsheim, Vice-President of Richland Operating Co. (R. 60);
W. C. Feazel, Independent gas producer (R. 63);
C. H. McHenry, Secretary of United Carbon Co. (R. 64).

To permit these officials to decide the rights of a farmer suing a gas company is like permitting a cat to decide whether a mouse should live.

Most of these witnesses swear positively that in their opinion the market price of the gas never, at any time, exceeded 3¢, which contradicts the verdict of the second jury, now res adjudicata, that the price after March 20, 1930 was 4.45¢. This shows the worthlessness of these opinions.

Each of these witnesses testified in the preceding jury trials. In open court petitioners had the privilege of cross-examination, and each of the two juries refused to accept their opinions or testimony, but based their verdicts entirely on the sales, as shown by their verdicts and poll. In so far as these affidavits attempted to state facts, not opinions, these witnesses almost entirely stated the contents of written documents not in the record, to which petitioners objected at the trial, as shown in the record at the end of each affidavit. Surely in a motion for summary judgment, the documents, not affidavits regarding them, should be produced.

The second line of evidence offered by respondents in support of their motion for summary judgment was four sales of gas:

1. Sale to Ruston Drilling Co. of a trivial quantity in 1927 at 3¢ (R. 68);

2. Sale to Magnolia Gas Co. in 1928 at 3¢ (R. 52);

3. Sale to Century Carbon Co. in 1929 at 3¢ for first six months and price based on the market for carbon-black thereafter (R. 77);

4. Sale to International Gas Products Co. March 3 or March 30, 1930 at 2½¢, but no deliveries made during the period involved in this suit.

The third line of evidence offered in support of motion for summary judgment was the affidavit of two bookkeepers employed by gas companies, that their books showed the net proceeds of their sales of gas (i. e. their profits), did not exceed 3¢ per thousand cubic feet (R. 62, 66).

The fourth line of evidence was a pamphlet of the U. S. Bureau of Mines showing that the estimated value at the wells of gas produced in Louisiana was 3¢ in 1927 and 3.3¢ in 1928 (R. 67).

This was all the evidence offered by respondent, in moving for summary judgment. We respectfully submit that the motion should have been denied on respondent's evidence.

Petitioners' Evidence

In opposition to granting motion for summary judgment, petitioners relied mainly on the actual sales.

Petitioners put before the Court a complete picture of the sales, by listing *all* the sales of natural gas made in the Richland gas field during the period of time involved in this suit (R. 42, 43), as follows:

Sale to Natural Gas & Fuel Co. in 1927 for 3¢ per thousand cubic feet;

Sale to Ford, Bacon & Davis in 1926 to 1930 for 4.25¢;

Sale to Magnolia Gas Co. in 1928 for 3¢;
Sale to Richland Gas Co. in 1928 for 3½¢ and 4¢;
Sale to Memphis Natural Gas Co. in 1928 for 5¢;
Sale to Southern Gas & Fuel Co. in 1928 for 5¢ and 6¢;
Sale to Dixie Gulf Gas Co. in 1929 for 3¢ and 4¢;
Sale to Mississippi River Fuel Co. in 1929 for 5¢;
Sale to Southern Natural Gas Co. in 1929 for 4½¢;
Sale to Arkansas Natural Gas Corp. (Respondent herein) for 4½¢.

The above sales stand unquestioned and undisputed in the record. The Court of Appeals is correct in saying that all of them (except the 1927 sale of drilling gas to Natural Gas & Fuel Co. for 3¢), were sales of large quantities of gas. There are no sales of smaller quantities of gas, because gas can be marketed only thru pipe lines, which must handle large quantities of gas to amortize their cost.

There were two other sales; one a sale stipulating price of 3¢ per thousand cubic feet for the first six months, and thereafter the price varying with the price of carbon black, made to Century Carbon Co. in 1929 (R. 77), which petitioners did not include, because it was not a cash sale at a fixed price; the other a sale to International Gas Products Co. made March 3, 1930 (R. 76), a few days before the expiration of the time involved in this suit, and under which no gas was delivered during this period.

In addition to sales, petitioners introduced in evidence two affidavits (R. 33, 42), which expressly and in detail deny almost every allegation of fact of any importance in respondent's six affidavits.

Second Question.

Conflict with Applicable Local Decisions.

The contract of lease sued on in this suit was made and executed in the State of Louisiana.

The Supreme Court of Louisiana has decided a suit substantially the same as the suit here at bar, in the case of *Wall* v. *United Gas Public Service Co.* 178 Louisiana 908, 152 Southern Reporter 561.

In that case, the Louisiana Court interpreted the royalty clause in a lease, which royalty clause read as follows:

> "The grantor shall be paid one-eighth (⅛) of the value of such gas, calculated at the market price per thousand feet, corrected to two pounds above atmospheric pressure."

By referring to the record in this suit at page 7 it will be seen that this is exactly the same royalty clause as in the lease sued on in the suit here at bar, except that in the case at bar a minimum of 3¢ is stipulated.

The issue in this Louisiana case was the same as in the case at bar. On this issue the Supreme Court of Louisiana said:

> "In the lease contract here involved, the lessee was required to pay to the lessor one-eighth of the value of the gas sold off the premises, calculated at the "market price" thereof. The price to be paid was left open, or made to depend upon the "market price" at the time the gas was produced * * * There is nothing in the contract itself nor in the testimony to show the intent of the parties touching the question whether the term "market price" meant the price at the well or the price the gas would bring in a market remote from the well. We think it reasonable to assume that the parties intended that, if there was a market for gas in the field, the current market price there should be paid."

The Supreme Court of Louisiana then quotes with approval the definition of market price given by this court in the case of *Muser* v. *MaGone*, 153 U. S. 240, as follows:

> "The price at which the owner of the goods, or the producer, holds them for sale; the price at which they are freely offered in the market to all the world; such

prices as dealers in the goods are willing to receive, and purchasers are made to pay, when the goods are bought and sold, in the ordinary course of trade."

This ruling of the Supreme Court of Louisiana was affirmed by that Court in the case of *Sartor* v. *United Carbon Co.*, 183 Louisiana 287, 163 Southern Reporter 103, and has never been changed.

The Court of Appeals cited the case decided by the Supreme Court of Louisiana, *Sartor* v. *United Gas Public Service Co.*, 186 Louisiana 555, 173 Southern Reporter 103, in which that Court rejected certain of the pipe line sales contracts offered in the case here at bar. This case is not pertinent, because the evidence regarding these pipe line contracts was not the same in that State case as the case at bar. A ruling that a certain document is not admissible in evidence, in one case, is not stare decisis of its admissibility in another case, because the surrounding evidence may be entirely different, and the document properly authenticated and identified in one case, and not in the other. In the case at bar, the identification and testimony regarding these contracts is entirely different from that in the State case cited.

The foregoing jurisprudence of the Supreme Court of Louisiana is so clear, so simple, so in accord with the intent of the parties, and so easily applied to the evidence in any lawsuit, that it certainly should be followed by the Federal Courts, not only because of the ruling of this Court requiring Federal Courts to the jurisprudence of State courts in local issues (*Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64), but also because it is so obviously correct.

Conclusion.

This case is of vital importance to every land-owner in a gas producing field, at least in the South. It is of even wider importance to every litigant using the practice of

summary judgment under Rule 56 of the Rules of Procedure for District Courts.

Because of this double importance, we suggest that the matter is of sufficient general importance to justify consideration by this Court.

Respectfully submitted,

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